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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1689

GEORGE S. PALMER, M.D. et al.,
Petitioners,

versus

FEMINIST WOMEN'S HEALTH CENTER,
Respondent.

PETITIONER'S, GEORGE S. PALMER, M.D., PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL I. SCHWARTZ
Suite 201 Ellis Building
1311 Executive Center Drive
Tallahassee, Florida 32301
Attorney for Petitioner
George S. Palmer, M.D.

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

M. GEORGE S. PALMER, M.D. al.,
Petitioners,

versus

FEMINIST WOMEN'S HEALTH CENTER,
Respondent.

PETITIONER'S, GEORGE S. PALMER, M.D.,
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, George S. Palmer, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fifth Circuit in this case. The judgment contains matters that are factually incorrect as well as legal opinion which totally disregards the law of summary judgment and disregards the absolute immunity from damages liability attributed to the statutory responsibilities of petitioner Palmer to determine whether an administrative proceeding should be initiated or continued under state law.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated December 20, 1978, is reported at 586 F.2d 530 and is set forth in the appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on December 20, 1978. A timely motion for rehearing was filed and that motion was denied by order of March 5, 1979. This petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 USC §1254 and 28 USC §2101(c).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred as a matter of fact in Part I of its written opinion noting that petitioner Palmer is a

physician who practices medicine in Tallahassee, Florida.

2. Whether the United States Court of Appeals for the Fifth Circuit erred as a matter of law in rendering a judicial pronouncement on the issue of coercion and conspiracy which in effect ignores the law of summary judgment and eliminates the entering of a summary judgment on the basis of any action of a state official or officer or employee in relegating such action to a jury question which would have a grossly chilling effect upon any state regulatory system operating under appropriate police power.

3. Whether the United States Court of Appeals for the Fifth Circuit entered an order which is contrary to a decision of the Supreme Court of the United States, to wit, *Butz v. Economou*, ____ U.S. ____, ____ Sup.Ct. ____, 57 L.Ed.2d 895, as the Circuit Court Panel has apparently totally misconstrued the duties and responsibilities of petitioner Palmer in respect of his statutory responsibilities to determine whether an administrative proceeding should be initiated or continued which responsibility entitled petitioner Palmer to absolute immunity from damages liability as embodied within the Parker Defense.

STATEMENT OF THE CASE AND FACTS

This is an anti-trust action brought in the United States District Court, in and for the Northern District of Florida, Tallahassee Division. Plaintiff-appellant-respondent, hereinafter referred to as respondent, alleges that several area doctors and the director of the State Board of Medical Examiners combined or conspired in restraint of trade to monopolize the performance of first trimester abortions in violation of the Sherman Anti-Trust Act at 15 USC §§1, 2.

The complaint was filed on September 30, 1975. Defendant-appellee-petitioner Palmer's, hereinafter referred to as petitioner Palmer, motion for summary judgment was granted by the United States District Court on September 3, 1976. On December 3, 1976, the District Court granted summary judgment in favor of all of the other defendants.

Notice of appeal was filed in the United States Court of Appeals for the Fifth Circuit on January 3, 1977. A subsequent notice of appeal was acknowledged by the United States Court of Appeals for the Fifth Circuit on March 28, 1977, stating that the nature of the order appealed from is an amended final judgment for all defendants entered by the Clerk of the United States District Court, Northern District of Florida, on February 24, 1977.

Thereafter, on March 30, 1977, respondent filed a motion to dismiss the notice of appeal filed on January

3, 1977, which motion was granted by the United States District Court for the Northern District of Florida on March 31, 1977.

After oral argument was heard, the United States Court of Appeals for the Fifth Circuit entered its order on December 20, 1978, finding there to be a triable issue of fact underlying the respondent's Sherman Act and common law tort claims against all the petitioners. As such, judgments in favor of the petitioners were reversed and the cause remanded for trial.

Thereafter, petitioner Palmer filed a timely petition for rehearing en banc on January 8, 1979, which petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on March 5, 1979.

From this order denying rehearing, petitioner Palmer now files this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in respect of Parts IVA and IVB of the order of said United States Court of Appeals dated December 20, 1978.

The pertinent facts may be stated as follows:

On August 29, 1975, a complaint was sent by the Ob-Gyn Committee of Tallahassee Memorial Hospital (TMH) to Dr. George Palmer, Executive Director of the Board of Medical Examiners. This complaint stated

that out-of-town doctors were doing office surgery at the center with no continuous aftercare as required by medical standards. The complaint also questioned the ethics of the advertising practices of the Feminist Women's Health Center (FWHC). (Palmer deposition — sealed, page 3, 55a)

Acting on this complaint, as he is required by law (§458.11, Florida Statutes, and others) petitioner Palmer initiated an investigation. On September 5, 1975, Dr. Palmer visited the FWHC to determine what the clinic did and who did it as far as the practice of medicine was concerned. (Palmer deposition — sealed, page 8, 55a) Dr. Palmer was accompanied on this visit by the Chief Investigator of the Board of Medical Examiners, Mr. Ed McCollum. During this visit, it was determined that Dr. Whaley, from Jacksonville, was, at that time, the doctor performing abortions at the clinic. (Palmer deposition, page 9, 56a). Also during the visit, Dr. Palmer inquired about 24-hour coverage of the patients on whom the abortions were performed (Palmer deposition, page 13, 57a). The answer to this inquiry led Dr. Palmer to believe that there were arrangements with a local hospital. (Ibid, 57a)

After returning to his office, Dr. Palmer phoned the Administrator of the TMH — the only area hospital which could receive patients from the FWHC. (Ibid, page 25, 59a) Dr. Palmer was told that there was no arrangement with the FWHC for follow-up care, but that anyone is entitled to use the emergency room (Palmer

deposition, page 21, 59a). After learning this, Dr. Palmer decided to call Dr. Whaley.

Dr. Palmer called Dr. Whaley in order to tell him what he felt about his conducting surgical procedures in a city 170 miles removed from where he actually resides without adequate pre-arranged 24-hour coverage of the patients on whom he performed the abortions (Palmer deposition, page 17, 58a). Dr. Whaley did not act on Dr. Palmer's advice, but rather returned to the clinic once more. (Whaley deposition, January 20, 1976, page 16, 62a). Later, as a result of his own personal feelings and the advice of several people, other than the petitioners, Dr. Whaley terminated his employment with the FWHC. (Whaley deposition, January 20, 1976, page 15, 62a). Dr. Whaley told the people at the Center that he would consider returning if they got hospital backup. (Ibid, page 17, 63a).

On the same day, September 5, 1975, Dr. Palmer called Dr. Mohammed to inform him that no violations of the Medical Practice Act had been found. (Palmer deposition — sealed, page 16, 57a). On September 12, 1975, Dr. Palmer compiled a memorandum of his findings on the situation at the FWHC and for the most part ended the investigation. (Ibid, page 25, 59a-60a). Dr. Palmer did, however, instruct Thomas Hannah, who is another investigator for the State Board of Medical Examiners, to visit the center and familiarize himself with it in case any further follow-up was necessary (Palmer deposition — sealed, page 26, 60a).

Later, Mr. Hannah checked on prescriptions that were being filled for the FWHC and his findings were placed in the files of the State Board of Medical Examiners.

On October 6, 1975, Dr. Palmer attended a Capitol Medical Society Meeting. By this time, Dr. Palmer was aware that the instant suit had been started against him (complaint was filed September 30, 1975). When a motion came up to give support to Dr. Palmer and the other defendants, Dr. Palmer participated in the unanimous vote.

REASONS FOR GRANTING THE WRIT

I.

The United States Court Of Appeals For The Fifth Circuit Erred As A Matter Of Fact In Part I Of Its Written Opinion Noting That Petitioner Palmer Is A Physician Who Practices Medicine In Tallahassee, Florida.

The United States Court of Appeals for the Fifth Circuit, in its opinion, has assumed that petitioner Palmer is a physician who practices medicine in Tallahassee, Florida. Court opinion, page 1709 (5a). This assumption is incorrect in that defendant Palmer ceased the private practice of medicine in Tallahassee, Florida, in mid January, 1970. See Affidavit attached (61a).

This misconception may have had a great effect upon the Court in somehow concluding that petitioner

Palmer might gain some advantage in participating in an alleged conspiracy to put the Feminist Women's Health Center out of business.

II.

The United States Court Of Appeals For The Fifth Circuit Erred As A Matter Of Law In Rendering A Judicial Pronouncement On The Issue Of Coercion And Conspiracy Which In Effect Ignores The Law Of Summary Judgment And Eliminates The Entering Of A Summary Judgment On The Basis Of Any Action Of A State Official Or Officer Or Employee In Relegating Such Action To A Jury Question Which Would Have A Grossly Chilling Effect Upon Any State Regulatory System Operating Under Appropriate Police Power.

The Court rightfully admits, based upon discovery testimony, that there exists no direct evidence of conspiracy in respect of petitioner Palmer. (39a)

The Court then goes on to rightfully conclude that petitioner Palmer, who has maintained his Florida medical license, is a member in good standing of the Capitol Medical Society. (40a)

Thereafter, the Court somehow draws the conclusion that the actions of petitioner Palmer — a state defendant — is subject to inference and is, therefore,

automatically relegated to a jury question hearing. At a trial, the respondent can "perhaps" find some way to "develop" a conspiracy. It is contended that the Court's opinion is predicated upon petitioner Palmer's membership in the Capitol Medical Society wherein somehow one or more members of that Society could have communicated with petitioner Palmer and in some way tainted him in the nature of a conspiracy at a time subsequent to his call to Dr. Walker Whaley but prior to the follow up visit to the Center by the Board's chief investigator. (40a)

This conclusion is reached in spite of the Court's finding that Dr. Whaley left the Center based upon the advice of several people and what he felt to be beneficial to himself. This conclusion is also reached despite the fact that the Court found that Dr. Whaley looked upon petitioner Palmer's advice as "helpful" and uncoercive. (37a)

The Court further totally ignored the depositional testimony of Dr. Max Suter, a professional colleague of Dr. Whaley's in Jacksonville, Florida, who stated that in the absence of proper aftercare provisions, Dr. Walker Whaley (as well as other physicians in the Jacksonville area) should not participate in the abortion activities of the Center and in fact used the words "Don't touch it with a ten-foot pole." (Suter deposition, page 34, 63a).

The Court also omitted the depositional testimony of Dr. Robert Thompson, Chief of the Department of

Obstetrics and Gynecology at the University Hospital in Jacksonville, Florida. Dr. Thompson stated that if the Center did not have 24 hour aftercare coverage that it was his recommendation to the various residents at the hospital that they not work at the Center until the matter was resolved locally. (Thompson deposition, page 18, 64a) Dr. Thompson further testified on deposition that at no time did he ever have any contact with petitioner Palmer. (Thompson deposition, page 22, 65a). Dr. Thompson additionally testified that it may very well have been he who suggested that backup arrangements for aftercare at the Center in Tallahassee be reduced to writing. (Thompson deposition, page 24, 66a).

In spite of all that has been stated herein, including the Court's admission that there exists no direct evidence of any communication to constitute a conspiracy, the Court appears to completely abandon the appropriate legal concept of summary judgment in favor of an absolute requirement of a trial by jury wherein the respondent is to be afforded an opportunity to somehow develop a case involving a conspiracy which includes petitioner Palmer which would have the effect of coercing Dr. Walker Whaley into leaving the Feminist Women's Health Center.

Apparently, when petitioner Palmer called Dr. Whaley the Court construed petitioner Palmer's testimony that he was offering his personal advice to be something outside of his official state function. Clear-

ly, this was not the case. When petitioner Palmer communicated with Dr. Whaley, all that petitioner Palmer was clearly stating to him was that he was personally calling Dr. Whaley in the exercise of his duties and responsibilities as the Executive Director of the Florida State Board of Medical Examiners pursuant to a proper complaint filed with the executive offices and consistent with his authority under §§458.11 and 458.1201, Florida Statutes.

This view is not only contrary to the basic notion of summary judgment but serves to create and produce a grossly chilling effect upon any state regulatory scheme designed to protect the public health and welfare of the citizens of the state under the state's police power.

The position of the Court and its effect upon any agency action under a state's police power creates a question of exceptional importance and, as such, is most worthy of consideration by this Honorable Court.

III.

The United States Court of Appeals For The Fifth Circuit Entered An Order Which Is Contrary To A Decision Of This Honorable Court, To Wit, Butz v. Economou, ____ U.S. ____, ____ Sup.Ct. ____, 57 L.Ed.2d 895, As The Circuit Court Panel Has Apparently Totally Misconstrued The Duties And Responsibilities Of Petitioner Palmer In Respect Of His Statutory Responsibilities To Determine Whether An Administrative Proceeding Should Be Initiated Or Continued Which Responsibility Entitled Petitioner Palmer To Absolute Immunity From Damages Liability As Embodied Within The Parker Defense.

Petitioner Palmer, as the Executive Director of the Florida State Board of Medical Examiners, has the authority, in addition to Board investigators, to investigate complaints that are filed with the executive offices of the Board. Dr. Palmer personally investigates certain complaints and, at times, he makes the decision that said complaints are without merit and communicates the same to either/or the licensee and the complainant. Petitioner Palmer also has the authority to recommend initiation of administrative action and at times directly participates in the temporary suspension of a physician's license by an order which he, himself, signs. See §458.121(7), Florida Statutes. (67a) Here, petitioner Palmer personally called a physician licensed in the State of Florida as a direct result of a complaint which was directed to him by the OB-GYN Staff of the Tallahassee Memorial Hospital by a letter dated August 29, 1975. (Court Opinion, pages 1711-1712, 8a-12a). In performing this state function, petitioner Palmer enjoys immunity from prosecution under the state's Medical Practice Act, and is accorded the same comprehensive immunity that federal officers would enjoy under the U.S. Constitution and *Butz v. Economou*, ____ U.S. ____, ____ Sup.Ct. ____, 57 L.Ed.2d 895. See also, *Parker v. Brown*, 317 U.S. 341 (1943).

Petitioner Palmer who, as stated above, is an officer who enjoys statutory responsibility for the decision to initiate or continue a proceeding subject to agency adjudication is entitled to absolute immunity from damages liability for his part in that decision. *Butz v. Economou, supra.*

The Court, in its opinion of December 20, 1978, (586 F.2d 530) fails to accord such immunity to petitioner Palmer, and, as such, their opinion is contrary to the decision of this Honorable Court in *Butz v. Economou, supra.*

CONCLUSION

It is respectfully submitted that this Honorable Court accept jurisdiction of this cause, grant petitioner Palmer's petition for writ of certiorari and allow petitioner Palmer to file his brief on the merits.

MICHAEL I. SCHWARTZ
Suite 201 Ellis Building
1311 Executive Center Drive
Tallahassee, Florida
Attorney for petitioner
Palmer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing petition for writ of certiorari were forwarded this ____ day of _____, 1979, to:

Betty O. Stinson
517 East College Avenue
Tallahassee, Fl 32301

Kent Spriggs
324 West College Avenue
Tallahassee, Fl 32301

J. Lewis Hall, Jr.
P. O. Drawer 804
Tallahassee, Fl 32302

M. Stephen Turner
P. O. Box 1876
Tallahassee, Fl 32302

Frank Santry
P. O. Box 1879
Tallahassee, Fl 32302

Ms. Nadine Taub
175 University Avenue
Newark, NJ

John C. Cooper
P. O. Box 1674
Tallahassee, Fl 32302

Joan Friedland
Women's Rights Litigation Clinic
Rutgers Law School
172 University Avenue
Newark, NJ 07102

Pamela Horowitz & John Carroll
Southern Poverty Law Center
101 South Hull Street
Montgomery, Al 36101

MICHAEL I. SCHWARTZ

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1924

D. C. Docket No. TCA 75-186

FEMINIST WOMEN'S HEALTH
CENTER, INC., ETC.,
Plaintiff-Appellant,
Cross-Appellee,

versus

MAHMOOD MOHAMMAD, M.D. ET AL.,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Northern District of Florida

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

December 20, 1978

Thornberry, Circuit Judge, specially concurring.

Issued As Mandate:

FEMINIST WOMEN'S HEALTH CENTER, INC., a Florida non-profit Corporation,
Plaintiff-Appellant
Cross-Appellee,

versus

Mahmood MOHAMMAD, M. D. et al.,
Defendants-Appellees
Cross-Appellants.

No. 77-1924.

United States Court of Appeals,
Fifth Circuit.

Dec. 20, 1978.

Appeals from the United States District Court for the Northern District of Florida.

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

WISDOM, Circuit Judge:

This appeal from an antitrust summary judgment raises questions concerning the jurisdictional reach of the Sherman Act, the scope of the *Noerr-Pennington* defense, the *Parker* doctrine of state action immunity, and the applicability of Florida's anticombination statute to the medical profession. The Feminist Women's Health Center, Inc. ("the Center"), brought this action for injunctive and monetary relief against Drs. Mohammad, Curry, Knight, Crane, Griner, Messer, and Palmer (individually and in his capacity as Executive Director of the Florida Board of Medical Examiners ("BOME")). The Center alleged that the doctors conspired to boycott the Center's Tallahassee abortion clinic, and to fix the prices for abortions in the

Tallahassee area in violation of federal and state anti-trust laws. The Center further alleged that the doctors individually, and in combination, attempted to, and in fact did, monopolize the market for providing women's health and abortion services in the Tallahassee area. In addition, the Center complained that certain tactics used by the defendants amounted under Florida law to tortious interference with the Center's business relationships with its physicians. After extensive pretrial discovery, the trial court granted summary judgment in favor of all defendants on all counts, and the Center brought this appeal. The doctors cross-appeal the trial court's early ruling denying their motion for summary judgment for lack of subject matter jurisdiction. We affirm the trial court's jurisdictional ruling and its order with respect to the state law anti-trust counts and reverse on all other points.

I

BACKGROUND

Because this appeal arises from a summary judgment, the statement of the background of the case is drawn from a record that reflects numerous disputed or potentially disputable issues of fact. Summary judgment having been entered against the plaintiff Center, the following discussion views disputed issues of fact in a manner favorable to the plaintiff.

The Feminist Women's Health Center, Inc., a Florida nonprofit corporation, operates the Women's Choice

Clinic, a women's health and first trimester elective abortions clinic in Tallahassee, Florida. The Center was incorporated in 1974 and opened its office in Tallahassee on June 29, 1974. The Center employs ten to fourteen lay "health workers" and occasionally a laboratory technologist, a registered nurse, and a nurse-practitioner. The Center does not keep full time physicians on its staff, but rather uses physicians on a part-time basis to perform abortions, and, when possible, to provide "back-up" emergency services when patients develop post-operative complications. The Center charges about $150 for an abortion, $25 to $35 of which is paid by the Center to the operating physician.

Defendants Mohammad, Curry, Crane, Knight, Griner, and Messer are Tallahassee physicians specializing in obstetrics and gynecology. All are members of the gynecology and obstetrics staff ("OB-GYN Staff") of Tallahassee Memorial Hospital, the only hospital in Leon County, Florida, that has complete facilities for treating patients with obstetrical and gynecological problems. Defendant Palmer is a physician who practices in Tallahassee, and is Executive Director of the Florida Board of Medical Examiners, the body that licenses physicians and regulates the practice of medicine in the State of Florida.

Even before it opened its doors, the clinic was a matter of concern to the obstetrics and gynecological staff of Tallahassee Memorial. At its regular monthly

staff meeting in May, 1974 the OB-GYN Staff adopted a resolution that it would not "approve" the Center if no member of the hospital staff were associated with the Center. The resolution, according to Dr. Brickler, the member of the OB-GYN Staff who first brought the Center to the staff's attention, was intended to express the staff's concern that the clinic have an "acceptable" local physician who would be available to take care of post-operative emergencies.

Despite some initial difficulties in recruiting physicians, the clinic operated without substantial controversy its first year. In the Spring of 1974, Lynn Heidelberg and Linda Curtis, two of the Center's directors, approached Drs. Brickler and Mohammad about working at the clinic. According to Ms. Curtis, Dr. Mohammad initially expressed interest in doing so, but at a second meeting changed his mind, citing pressure from his colleagues as well as the May resolution of the OB-GYN Staff. Dr. Mohammad indicated that he might consider working at the clinic, but only at a fee of $100 per procedure, a figure that is approximately triple the fee customarily received by operating physicians at the clinic. Dr. Brickler, on the other hand, decided to work at the clinic after having initially expressed fears that the OB-GYN Staff would disapprove of his doing so. Dr. Brickler informed the Center, however, that he would associate with the clinic on the condition that the clinic not advertise its services. The Center agreed and Dr. Brickler began his work for the clinic. In April 1975 Dr. McWilliams, another member

of the Tallahassee Memorial OB-GYN Staff, began performing abortions at the clinic and handling post-operative aftercare. Drs. Brickler and McWilliams performed 816 abortions at the clinic that first year.

The clinic's difficulties began in June of 1975 when Linda Curtis gave an interview to the *Tallahassee Democrat*, the city's daily newspaper. The interview resulted in the publication in the June 20 edition of the *Democrat* of an article in which Ms. Curtis described the clinic and favorably compared its services with hospital abortion procedures. In particular, the interview emphasized the relative inexpensiveness of first trimester elective abortions at the clinic, and the advantages to women of choosing a place where "women set the pace for what goes on". The next day, Dr. Brickler terminated his relationship with the clinic, apparently because of the article.

The newspaper article succeeded in making the clinic, once again, a subject of great interest to the OB-GYN Staff at Tallahassee Memorial. At the July 1, 1975 meeting of the OB-GYN Staff, at which Drs. Messer, Griner, Crane, and Mohammad were present, Dr. Messer noted that Dr. Brickler was no longer working at the clinic and that an out-of-town physician was working there. The staff discussed the question of the ethics of the clinic's advertising, and concluded that physicians should not associate with organizations that advertise their medical services. The staff decided to bring the matter of the clinic's advertising to the atten-

tion of the State Board of Medical Examiners. The minutes of that meeting record that "Dr. Brickler commented he feels the local situation will collapse if it does not get support from the Obstetricians". A day or so after that meeting, Dr. McWilliams, who had attended the meeting, called the Center to inform it that he could not continue working at the clinic unless the controversy concerning the clinic's advertising was straightened out. He informed the clinic that Dr. Mohammad was upset about the newspaper article. In the days following the July 1 meeting Ms. Curtis met with Dr. Mohammad, who said that the Center should stop all advertising and that those associated with it should not make speeches about the Center. At that time Dr. Mohammad agreed to arrange an emergency meeting of the OB-GYN Department so that representatives of the Center could meet the other members of the staff. When Ms. Curtis and another director of the Center arrived for the emergency meeting on July 8 or 9 only Dr. Mohammad was present. Dr. McWilliams stated in his deposition that he was notified of a meeting earlier that day, but was not informed about the purpose of the meeting and therefore failed to attend. No further meeting was scheduled. Dr. McWilliams testified that he again raised the question of such a meeting with Dr. Mohammad, but Dr. Mohammad informed him that he had polled the other members of the staff and that no one wished to meet with representatives of the Center.

At the next monthly meeting of the OB-GYN Service on August 5, 1975, the staff passed a motion that

the Service write a letter to the Capital Medical Society ("CMS"), a private organization of Tallahassee area physicians, expressing the doctors' view that physicians in the CMS should not associate with organizations that advertise their medical services. Dr. McWilliams spoke up to explain that he was unaware when he began working for the Center that the clinic was controversial because of its advertising and its nonprofit status. He revealed to the staff that he had told the clinic of his plans to leave if the controversy was not settled. Four days later, he told the Center that he would have to leave, citing the controversy and his desire not to fall into disfavor with his colleagues. As Dr. McWilliams explained in his deposition, he chose to leave "because of something that I was doing that they [the Tallahassee OB-GYNs] considered unethical". Shortly thereafter, Dr. McWilliams left the clinic.

About the time that Dr. McWilliams left the clinic, the Center called upon Dr. Brickler, who had severed his relations with the clinic some months earlier, in an effort to recruit him to handle back-up or post-operative emergencies, either on a formal or an informal basis. Dr. Brickler, according to his deposition, told the Center that if it referred a patient to his office for post-operative care he would see the patient, just as he would see any other patient. He declined, however, to enter any formal arrangement with the Center. Brickler indicated that to do so would involve him in controversy with his fellow obstetricians. The OB-GYNs, according to Brickler's deposition, "almost

literally sleep together", and his colleagues could make things very unpleasant for him; they could, for example, refuse to take his patients were he to leave town.

Beginning in July or August 1975, the clinic began to rely heavily on the services of residents-in-training at the University Hospital in Jacksonville. The Center had arrangements with the Jacksonville residents that they would come to Tallahassee one day a week to perform abortions at the clinic. On August 29 the OB-GYN Staff sent a letter to defendant Palmer, Executive Director of the BOME, stating that out-of-town doctors were performing surgery at the clinic without adequate provision for continuous aftercare, in possible violation of the Florida Medical Practice Act. The letter requested Dr. Palmer to take "appropriate corrective measures". Acting on the staff's complaint, as he was required to do by law, Dr. Palmer visited the clinic, accompanied by Ed McCollum, the Chief Investigator of the BOME, to view its operations and to determine what doctors were practicing there. He found that Dr. Walker Whaley, a resident physician from University Hospital in Jacksonville, was performing abortions at the clinic. Dr. Palmer inquired about aftercare coverage of the clinic's abortion patients, and was told by Ms. Curtis that the clinic had arrangements with Tallahassee Memorial to take care of post-operative complications. Later that day, Dr. Palmer called the hospital concerning the clinic's backup coverage. The hospital administrator informed Palmer that the backup arrangements were not formal, but that he had told Ms. Curtis that any clinic patient could come to the

hospital's emergency room for attention, as in the case of any person in need of immediate medical care.

Dr. Palmer then called Dr. Whaley on the telephone. After first identifying himself as the Executive Director of the BOME, and telling Dr. Whaley that the telephone call was personal in nature, Palmer told Whaley that his, Dr. Whaley's, activities were not in his opinion illegal, but that his personal advice was that it might be in Whaley's best interests to leave the clinic. Dr. Palmer thought that it was unwise for the young physician to get involved in something as controversial as the clinic. He pointed out that the aftercare arrangements were in his opinion "questionable", and that Dr. Whaley was running a risk of malpractice liability because he could not follow up on his patients at Tallahassee Memorial Hospital inasmuch as Whaley did not have staff privileges at Tallahassee Memorial, nor a Tallahassee or Leon County occupational license. Following his conversation with Dr. Whaley, Palmer called Dr. Mohammad to report his findings. On September 30, Dr. Palmer sent another investigator to the clinic to determine if the clinic, at that time, had a licensed physician performing abortions.

At the September 2, 1975 meeting of the OB-GYN Staff of Tallahassee Memorial, at which Drs. Crane, Curry, Griner, Messer, and Mohammad were present, the staff voted to send a letter to the residents at University Hospital in Jacksonville who were performing abortions at the clinic. The purpose of the communication was to inquire of the doctors whether proper

aftercare was being provided for the patients on whom the doctors were performing abortions at the Tallahassee clinic. On September 10, a letter, signed by all the defendants with the exception of Dr. Palmer, was sent not to the residents but to Dr. Robert Thompson, the head of the residency program at University Hospital. The letter stated:

> In the last monthly meeting of the OB-GYN Staff at Tallahassee Memorial Hospital, the subject of the Feminist Womens' Health Clinic was brought up, and the fact that one or two of the residents from your program performed abortions without provision for possible complications and leave patients without provision for 24-hour coverage was discussed.
>
> For your information, the Feminist Womens' Health Center has no backup for abortions performed and there is no physician in town covering aftercare complications of procedures done.

Dr. Whaley returned to the clinic after Dr. Palmer's call, but he told the Center that he could not work for them until the controversy was resolved. Dr. Whaley testified in his deposition that the aftercare problem was not the main reason that he left the clinic. His primary concern, he said, was the controversy between the clinic and the Tallahassee medical community. He ultimately left the clinic, he testified, because of the advice given him by several people.

Another of the residents at University Hospital in Jacksonville, Dr. Rhett, left the clinic in mid-September of 1975, following the staff's communication to Dr. Thompson. According to Dr. Rhett's deposition, he left the clinic because he could not get a straight answer from the clinics concerning its aftercare arrangements. He also testified that he felt threatened professionally by the controversy surrounding the Center.

The Center brought suit charging that the doctors had conspired to monopolize and restrain trade in the provision of abortions and related services, in violation of §§1 and 2 of the Sherman Act and §542.05 of the Florida statutes. The Center also charged that the doctors had unlawfully interfered with the Center's contractual relations with its physicians. Following the Center's filing of the complaint, the Capital Medical Society passed a resolution, coauthored by Dr. Palmer, to support the defendants in the prosecution in this litigation. The Center, throughout this litigation, has cited the Capital Medical Society's resolution as the "consummation" of the alleged conspiracy. On June 9, 1976 the trial court denied the Center's motion for a preliminary injunction. The court found that the plaintiff had demonstrated a substantial likelihood of prevailing on the merits of its claims against all defendants except Dr. Palmer, but that there was no likelihood that the Center would suffer irreparable harm pending adjudication of the cause. *Feminist Womens' Health Center v. Mohammad*, 1976, N.D.Fla., 415 F.Supp. 1258. The court intimated, in that order, that

the "state action" defense of *Parker v. Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, might be applicable to Dr. Palmer. In a pretrial order of September 3 the court granted Dr. Palmer's motion for summary judgment. On December 3, the court rendered summary judgment in favor of the remaining defendants.

II

THE REACH OF THE SHERMAN ACT

At the outset we face the question whether the district court had subject matter jurisdiction of this action. Jurisdiction is predicated upon §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, which grant the federal district courts jurisdiction of private actions for treble damages and injunctive relief, respectively, to redress injuries resulting from violations of the federal antitrust laws. The appellees argue that subject matter jurisdiction is lacking because the action complained of does not have the effect on interstate commerce requisite to liability under the Sherman Act. If the Center has not stated a claim under the Sherman Act, then the federal court, of course, lacks jurisdiction of the pendent state law claims.

Section 1 of the Sherman Act outlaws every combination or conspiracy "in restraint of trade or commerce among the several States". Section 2 of the Act prohibits monopolization of, and attempts and conspiracies to monopolize "any part of the trade or commerce among the several States." It has been said that

"this language defines both the prohibited conduct and the jurisdictional range of the statute." Comment, 21 Vill.L.Rev. 721, 725 (1976); *see also Rasmussen v. American Dairy Ass'n*, 9 Cir. 1972, 472 F.2d 517, 521. The Supreme Court has construed the Sherman Act as reaching the full extent of the Congress's power under the commerce clause. Whether the conduct complained of falls within the scope of the Sherman Act's "jurisdiction" turns on whether it has or could likely[1] have a substantial effect on interstate commerce. *E.G., International Salt Co. v. United States*, 1947, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; *Lehrman v. Gulf Oil Corp.*, 5 Cir. 1972, 464 F.2d 26, *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665.

The district court determined, after a full evidentiary hearing on the matter, that it had jurisdiction of the Center's claims. The court made the following findings. (1) Tallahassee, Florida, where the clinic is located, is within 30-35 miles of the Georgia state line. (2) Tallahassee is a center for health care in the northern Florida-southwestern Georgia area. (3) From June 1974 to September 1976, 2,177 abortions were performed at the plaintiff's clinic, 176 (or 8%) of which were performed on persons who came from outside the state of Florida. Abortions for out-of-state patients brought the plaintiff roughly $26,400 in gross receipts. (4) From June 1974 through April 1976 the Center

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1 Antitrust plaintiffs need not await complete ruin before asserting their rights. *See Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 5 Cir. 1977, 555 F.2d 426.

received $562.00 in payments from out-of-state insurance companies for abortions performed at the clinic. (5) From June 1974 through September 1976 the Center made out-of-state purchases of $10,017.34 of supplies and equipment to be used in connection with the provision of abortion services. At least $9,845.34 of these supplies were purchased in the period of June 1974 to April 1976. (6) In that same period the Center purchased $15,493.79 of supplies from within the state of Florida. (7) From June 1974 through July 1976 the Center spent $4,340.65 on interstate travel by its officers and employees. (8) From the Center's inception, the volume of patients and the gross income of the clinic steadily increased. The district court found that the clinic had developed significant contacts with interstate activity, and that its interstate connections are likely to grow as the business grows. Taking the allegations of the complaint as true, the court concluded, the clinic and its interstate business was seriously threatened by the defendants' actions.[2]

The defendants do not quarrel with the district court's findings of fact, but do contest its conclusion that the facts show a quantum of interstate involvement sufficient to sustain Sherman Act jurisdiction.

2 In determining the jurisdictional issue the district court refused to consider the interstate flow of Medicaid payments received by the Center. On appeal, the Center (the cross-appellee on this issue) has urged that the trial court should have taken those payments into account, citing *Alabama Optometric Ass'n v. Alabama State Board of Health*, 1972, M.D. Ala., 379 F.Supp. 1332. Since we affirm the trial court's jurisdictional ruling in favor of the Center, we need not address that issue.

They argue that the Center's business is not converted into an interstate business by virtue of the clinic's treatment of patients who travel from other states to use its services. Indeed, they seem to maintain that the flow of out-of-state patients must be ignored altogether. Once the interstate flow of patients is discounted, the physicians contend, the interstate connection is de minimis and certainly far more tenuous than any that has been held sufficient for Sherman Act purposes in any reported case. We disagree with both contentions; we hold that the district court did not err.

Although the mere fact of dealings with out-of-state customers, whether or not those customers cross state lines for the purpose of buying a firm's goods or services, might not of itself establish a sufficient interstate nexus, it does not follow that those dealings are of no pertinence whatsoever. The Sherman Act reaches conduct that is likely to have a substantial adverse effect on interstate commerce, a question, as we have emphasized in prior decisions, that is to be determined from the aggregate of factors. *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n*, 5 Cir. 1975, 510 F.2d 1121, 1125; *Lehrman v. Gulf Oil Corp.*, 5 Cir. 1972, 464 F.2d 26, 48, *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665. The plaintiff's business with out-of-state patients is one of the factors to be considered. Were the Center forced to close the Tallahassee clinic, the flow of persons crossing state lines to avail themselves of the clinic's services would cease. That the patients come to the plaintiff, and not the plaintiff to the patients, does

not alter the interstate character of those transactions.[3]

Looking to the aggregate of factors, including the clinic's volume of out-of-state patients, we cannot say that the Center has failed to demonstrate a likelihood of substantial impact on interstate commerce. There is, of course, no ready and easy test for determining whether particular restraints have, or will likely have, the requisite effect in interstate commerce. As the Third Circuit Court of Appeals has observed, "the precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact

3 This Court's recent decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 5 Cir., 583 F.2d 1315, 1978, is not to the contrary. That case involved a civil action alleging that real estate brokers fixed prices in connection with the sale of real estate in the New Orleans area. The court applied the substantial effects test and held that Sherman Act jurisdiction is not conferred by the allegation "that many of the defendants' customers are 'persons moving into and out of the Greater New Orleans area.' " 583 F.2d at 1320. We do not read the *McLain* opinion to say that the flow of out-of-state customers is not a factor to be considered in determining jurisdiction, nor even that jurisdiction can never attach on the sole basis of transactions with out-of-state customers. The court held that residential real estate brokerage activities do not substantially affect interstate commerce because the interstate consequences are remote or incidental. 583 F.2d at 1320 & n. 4. That conclusion is unassailable, because few people cross state lines *for the purpose* of purchasing residential real estate. The effects of the conduct alleged in this case, accepting the allegations of the complaint as true, cannot be characterized as "remote" or "incidental", however, for the district court found that Tallahassee is a regional, interstate center for the provision of medical services. A fair implication from this finding is that persons cross the Florida-Georgia state line for the purpose of coming to the Center's Tallahassee clinic.

local activities must have upon interstate commerce before they confer jurisdiction." *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 3 Cir. 1973, 490 F.2d 48, 51. The interstate effects alleged here are well within the boundaries suggested by the "general sense" or our decisions on Sherman Act jurisdiction.

In *Lehrman v. Gulf Oil Corp.*, 5 Cir. 1972, 464 F.2d 26, *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665, this Court upheld jurisdiction in a case analogous to this one in its jurisdictional aspects. *Lehrman* was a private antitrust suit by a Gulf service station operator. Lehrman sought to recover damages that resulted from the effect on his business of Gulf's wholesale pricing practices. He urged that Gulf's pricing policies, by preventing him from engaging in price competition with nearby competitors, forced him out of business. Although we assumed, for purposes of the appeal, that the gasoline sold by the plaintiff never moved in interstate commerce, we nevertheless held that Gulf's conduct substantially affected interstate commerce. Two distinct and sufficient grounds for jurisdiction were set forth. First, we noted that Gulf's pricing system affected dealers throughout the southwestern United States, many of whom, the evidence tended to show, did distribute gasoline that moved in interstate commerce. Thus the pricing system as a whole constituted a combination that substantially restrained interstate commerce. The alternative ground is of importance to this appeal. We pointed out that Lehrman sold not only gasoline, but also tires, batteries, and accessories, the largest part of which, unlike his gas-

oline, originated from outside the state of Texas. The termination of Lehrman's business, we held, had an appreciable effect on the flow of tires, batteries, and accessories from outside Texas. We stated: "The effect was appreciable because, while small relative to total Gulf TBA sales, the gross amount of such sales would be significant over the extended period of time Lehrman might have been able to continue in business." *Id.* at 35.

The case of *Copper Liquor, Inc. v. Adolph Coors Co.*, 5 Cir. 1975, 506 F.2d 934 presented a similar situation. In *Copper Liquor* an owner of a retail liquor store sued the defendant brewing company complaining that the refusal of Coors's local distributor to sell him Coors beer was part of a conspiracy to fix retail prices, and that his inability to secure the beer from other distributors was the consequence of an unlawful scheme of territorial market division. We upheld Sherman Act jurisdiction, pointing to evidence showing that the unavailability of Coors beer at the plaintiff's retail store diminished customer demand for the plaintiff's other products that did move in interstate commerce. Citing *Lehrman* we observed: "This impact on other products has been held to have a sufficient effect on interstate commerce to bring the case within the federal antitrust laws." *Id.* at 949.

The activities affected by the restraints alleged in this case have an interstate nexus at least as substantial as those involved in *Lehrman* and *Copper Liquor*, and those

authorities therefore counsel affirmance of the district court's ruling on jurisdiction. In *Lehrman*, jurisdiction was founded on the impact of Gulf's activities upon the TBA items purchased and sold by a service station operator. That effect could hardly be more substantial than the cessation of the Center's purchases of $4,000 or $5,000 worth of out-of-state supplies a year and of the clinic's $12,000 worth of yearly business with out-of-state patients. The interstate nexus in *Copper Liquor* was even less substantial, for the plaintiff in that case did not contend, as the Center does here, that the challenged practices threatened to shut down his business, and with it his purchases of products in interstate commerce.

We conclude, from all the evidence adduced at the jurisdictional hearing before the district court, that the court ruled correctly. We recognize that there must be a limit on the reach of Sherman Act jurisdiction. This case, however, is within that limit.

III

THE MEMBERS OF THE OB-GYN STAFF

The district court granted summary judgment in favor of Drs. Mohammad, Curry, Crane, Knight, Griner, and Messer largely on the strength of the *Noerr-Pennington* doctrine. According to that doctrine, articulated in a line of Supreme Court decisions that began with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 1961, 365 U.S. 127, 81 S.Ct. 523, 5

L.Ed.2d 464, efforts to influence the government to take anticompetitive action cannot be made the basis of antitrust liability. *Noerr* itself concerned efforts to achieve anticompetitive ends by securing legislative action. Succeeding court decisions established that antitrust immunity extends to attempts to influence executive[4] and adjudicative[5] governmental bodies as well. The Court has held that petitioning activity is protected "regardless of intent or purpose." *United Mine Workers v. Pennington*, 1965, 381 U.S. 657, 670, 85 S.Ct. 1585, 14 L.Ed.2d 626. The petitioning activity, however, must be genuine. Protection does not extend to purported petitioning that is in fact "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 1961, 365 U.S. at 144, 81 S.Ct. 523, 533. Although the Court's *Noerr* opinion suggested that petitioning activity is exempt because the Sherman Act was simply not designed to reach such conduct, it is now clear that the doctrine is rooted in the first amendment's guarantee of the right to petition. *See California Motor Transport Co. v. Trucking Unlimited*, 1972, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642; *see generally* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi.L.Rev. 80 (1977).

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4 *United Mine Workers v. Pennington*, 1965, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626.

5 *California Motor Transport v. Trucking Unlimited*, 1972, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642.

The trial court held the following conduct to be of the type protected by the *Noerr-Pennington* defense: (1) The OB-GYN Committee's letter to Dr. Palmer and the BOME; (2) the Committee's letter to Dr. Thompson, the head of the residency program at the Jacksonville hospital; (3) the Committee's communications to the Capitol Medical Society regarding the Center's abortion clinic; and (4) the discussions among the members of the OB-GYN staffs of Tallahassee Memorial and the Jacksonville hospital regarding their members' medical practice. Since these communications, in the district judge's opinion, make up the core of the Center's case against the physicians, he ruled that the fate of the action turned on whether the Center could bring it within the "sham" exception adumbrated in the Supreme Court's *Noerr* opinion. Finding that the plaintiff had insufficient evidence that the defendants' petitioning activities were sham, the court granted the defendants' motions for summary judgment.

The foundation of the trial court's ruling was its determination that the defendants' communications were protected petitioning activity. We hold, however, that the communications, with the exceptions of the physicians' letter of complaint to the BOME and their post-complaint activities in support of their position in this lawsuit, are as a matter of law unprotected by the *Noerr-Pennington* doctrine. In addition, a triable issue of fact remains as to whether the OB-GYN's letter of complaint to Dr. Palmer was but a sham effort to influence government action. The district court's mis-

application of the *Noerr* doctrine necessitates reversal of the judgment.

The Committee's letter of complaint to Dr. Palmer is a form of activity that is protected by the *Noerr-Pennington* doctrine absent proof of sham. The Board of Medical Examiners is a creature of state law. Section 458.1201 of the Florida Statutes authorizes the Board to discipline licensed physicians found guilty of any of the violations defined by chapter 458. The defendant doctors wrote Dr. Palmer requesting him to investigate possible violations of the Medical Practice Act. Whether the doctors' petition is immune from antitrust attack turns on the factual determination whether it was genuinely intended to influence Dr. Palmer to take official action in his capacity as Executive Director of the BOME.[6] It is the jury's task to resolve this issue.

6 The court required the plaintiff to meet the high burden of proof of sham conduct suggested by the Supreme Court's opinion in *Otter Tail Co. v. United States*, 1973, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359. In *Otter Tail* the Court stated that antitrust liability may attach "where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims". 410 U.S. at 380, 93 S.Ct. at 1031. *See also California Motor Transport Co. v. Trucking Unlimited*, 1972, 404 U.S. 508, 513, 92 S.Ct. 609, 30 L.Ed.2d 642. *Otter Tail* and *California Motor Transport* acknowledge that a showing of a pattern of repetitive, baseless claims is strong evidence of sham petitioning, but they do not hold that such evidence is *essential* to proof of sham. The *Noerr* doctrine presents no bar if the plaintiff proves that the petitioning was not a genuine effort to influence public officials to take governmental action. *See California Motor Transport*, 404 U.S. at 511-512, 92 S.Ct. 609; *see generally* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U.Chi.L.Rev. 80, 106-110 (1977). Absent clear direction from the Supreme Court, we see no reason for erecting a special, high burden of proof on this issue.

We agree with the district court, however, that the Center cannot base a right to recovery on the actions of Dr. Palmer and the other members of the Capitol Medical Society in adopting a resolution to provide moral and financial support to the doctors' defense of this lawsuit. The plaintiff Center characterizes the medical society's resolution of support as the "consummation" of the alleged conspiracy. In *California Motor Transport Co. v. Trucking Unlimited*, 1972, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642, the Supreme Court held that joint efforts of competitors to seek adjudicative action are protected. The first amendment right of competitors to join in petitioning courts and administrative bodies entails the right to band together for purposes of supporting litigation, as the physicians in the Capitol Medical Society have done here. Whether the action of the medical society can be linked to the alleged conspiracy that spawned the Center's original complaint is irrelevant, for petitioning activity according to *Pennington* "is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593. The district court did not err in granting summary judgment in favor of the defendants on this issue. There is no genuine issue as to the physicians' intent in adopting the resolution. It cannot be seriously urged that either the physicians' defense of this lawsuit or the medical society's resolution of support is a sham.[7]

7 Moreover, it would be improper to admit evidence on the medical society's meeting and resolution. Evidence of activity that is protected by the *Noerr* doctrine may be admitted to show the purpose and character of other activity if doing so is not overly

The district court's determination that the other communications are protected rests on three statutes that, in its view, make the OB-GYN staffs and the Capitol Medical Society integral parts of the state's apparatus for regulating the practice of medicine. Section 768.40 of the Florida Statutes immunizes "medical review committees", such as local societies of health care providers and the medical staffs of licensed hospitals, from liability arising out of their actions taken in the course of evaluating the performance of health care providers. The statutes contemplate committees that concern themselves with the quality and cost of medical services rendered by providers. Section 395.065 authorizes the medical staff of licensed hospitals "to suspend, deny, revoke, or curtail the staff privileges of any staff member for good cause". The statute enumerates a few nonexclusive grounds constituting "good cause" and immunizes the hospital, staff, and staff members from liability arising out of actions taken in good faith in carrying out the staff's disciplinary function. Section 458.1201, the statute set-

prejudicial to the defendants. *United Mine Workers v. Pennington*, 381 U.S. at 670-71 n. 3, 85 S.Ct. 1585; *Household Goods Carriers' Bureau v. Terrell*, 5 Cir. 1971, 452 F.2d 152, 158 n. 18. Admissibility, we think, should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights. The medical society's meeting and resolution have some evidentiary bearing on the character of the doctors' other actions and may aid in demonstrating Palmer's sympathies, but the probative value of this evidence is low. As evidence of the alleged conspiracy it is cumulative. As evidence of Dr. Palmer's state of mind it is exceedingly weak, for at the time the resolution was co-authored by Palmer he was already a party defendant to this suit. Its evidentiary value to the plaintiff is far outweighed by the defendants' first amendment interests.

ting forth the disciplinary powers of the BOME, authorizes the Board to impose penalties on licensed physicians who have been disciplined by a peer review association or a hospital medical staff, and requires such organizations to report all disciplinary actions to the BOME.[8] §458.1201(1)(p). The court felt that these

8 The relevant portions of §458.1201 provide as follows:

(1) The board shall have authority to deny an application for a license or to discipline a physician licensed under this chapter or any antecedent law who, after hearing, has been adjudged unqualified or guilty of any of the following:

* * *

(p) Being removed or suspended, or having disciplinary action taken by his peers within any professional medical association, society, professional standards review organization established pursuant to section 249F of Public Law 92-603, or similarly constituted professional body, whether or not such association, society, organization, or body is local, regional, state, national, or international in scope, or by being disciplined by a licensed hospital or medical staff of said hospital for immoral or unprofessional conduct or willful misconduct or negligence by the person in his capacity as a physician licensed pursuant to this chapter. Anybody taking action as set forth in this paragraph shall report such action to the board within 30 days of its occurrence or be subject to a fine assessed by the board in an amount not exceeding $500.

* * *

(3)(a) When the board finds any person unqualified or guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following:

1. Deny his application for a license;
2. Permanently withhold issuance of a license;
3. Administer a public or private reprimand;
4. Suspend or limit or restrict his license to practice medicine for a period of up to five years;
5. Revoke indefinitely his license to practice medicine;

statutes, in effect, make the OB-GYN staffs and the Capitol Medical Society public regulatory bodies, and that the discussions at the OB-GYN Committee meetings and the Committee's letters to the Jacksonville OB-GYN's and the medical society were therefore protected solicitation of government action.

The defendants' claim of *Noerr* protection, in our view, rests ultimately on §458.1201. Section 768.40 does not recruit medical review committees into government service. The sole purpose of that provision is to confer limited immunity upon the actions of review commitees within the scope of their functions, as defined by subsection (1) of §768.40, and to bar the use of committee records and proceedings as evidence in civil actions.[9] Section 395.065 recognizes the existence of hospital staff self-regulation, imposes a "good cause" limitation on disposition of staff privileges, and insulates good faith disciplinary action from civil liability. This falls short of conferring governmental status upon hospital medical staffs.[10]

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6. Require him to submit to the care, counseling, or treatment of physicians designated by the board;
7. Require him to participate in a program of continuing education prescribed by the board;
8. Require him to practice under the direction of a physician in a public institution, a public or private health care program, or private practice for a period of time specified by the board.

9 Florida's Medical Practice Act cannot, of course, operate to bar the use of such evidence in the trial of a federal cause of action.

10 Moreover, the defendants do not argue that the communications in issue had anything to do with possible action regarding any physician's staff privileges.

Section 458.1201, however, affords a colorable basis for the defendants' claim. The statute, by enabling the BOME to take disciplinary action against physicians who have been disciplined by medical review organizations, vests those organizations with a kind of quasi-legislative authority. The appellees' strongest argument for *Noerr* protection is that communications between a review organization and its members looking towards possible disciplinary action constitutes the solicitation of action that, in the event it became the basis of BOME disciplinary action, would be legislative in character.

We are not persuaded, however, that §458.1201 makes medical review organizations public regulatory bodies. The contention that §458.1201 incorporates the disciplinary actions of such organization into regulatory law is weakened by the statute's permissive language. Subsection (1) does not *require* the BOME to take action against physicians disciplined by private professional groups; it merely authorizes the Board to do so. Subsection (3)(a) of the statute simply provides that the Board "may enter an order" penalizing physicians who are found to have violated the statute. Thus the Board is given broad discretion to decline to take action against physicians. Where the legislature, in §458.1201, intended to command a certain course of action, it made its intentions quite clear by using the word

"shall".[11] As we read the statute, disciplinary action by a medical peer group affords grounds for Board action but in no way binds the Board to act. Thus, ultimate authority to enact and enforce professional standards and to adjudicate violations of law rests with the Board. Hospital medical staffs and medical societies play an important role in Florida's regulatory scheme,[12] but that

11 Section 458.1201(5), for example, provides: "The board *shall* report to the President of the Senate and the Speaker of the House of Representatives on February 1 of each year . . . the status of the actions taken by the board in carrying out the responsibilities assigned to it under this section." (Emphasis added.) Subsection (1)(p) states: "Anybody taking action as set forth in this paragraph *shall* report such action to the board within 30 days of its occurrence or be subject to a fine assessed by the board in an amount not exceeding $500." (Emphasis added.)

12 Throughout the appellees' briefs runs the argument that free discussion will be chilled, and Florida's system of self-regulation severely hampered, if this Court does not rule that the conduct of the OB-GYNs is *Noerr*-protected. This is not, properly speaking, an argument from the first amendment's guarantee of the right to petition, but one from the amendment's guarantee of freedom of speech. If the facts, as fully developed, show that the OB-GYNs discussed the clinic and adopted certain resolutions concerning the clinic, a free speech question would be presented. If the facts suggested simply that certain physicians were persuaded by their colleagues that the clinic's mode of operations was detrimental to the public welfare, or that those physicians avoided the clinic simply out of the desire not to be poorly thought of by their colleagues, then the imposition of antitrust liability might implicate first amendment values. At this point in the litigation, however, the facts are insufficiently developed to speculate about the merits of a possible free speech defense. We do note, however, that in cases involving antitrust challenges to professional rules and canons enacted ostensibly in the public interest, the Supreme Court has not suggested that the first amendment bars relief. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Goldfarb v. Virginia State Bar*, 1975, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572. It would seem anomalous to hold that the imposition of standards is not protected activity, but that the proposal and advocacy of standards in a manner bordering on imposition of standards is protected.

role is not a governmental one.[13] Although the actions of such groups in reporting disciplinary findings and suspected violations to the BOME may be petitioning activity within the meaning of the first amendment, communications within those groups are not.[14]

Evaluating the evidentiary materials on file in light of our ruling on the availability of the *Noerr-Pennington* defense, we conclude that there are triable issues of fact.[15] The district court itself in granting summary

13 We do not imply that the disciplinary actions of the medical review groups would be governmental in character if the statute directed the BOME to take action against physicians disciplined by such groups. That question is not before us.

14 In his brief, appellee Curry contends that *Noerr* protection extends to the Tallahassee OB-GYNs' letter to Dr. Thompson at Jacksonville University Hospital in Jacksonville. His theory is that since the hospital is a county hospital operated by the Duval County Hospital Authority, the actions of the hospital staff and Dr. Thompson, head of the residency program, are "quasi-governmental". Dr. Curry does not, however, specify the kind of government action that the OB-GYNs were seeking. We do not think that any disciplinary action taken by Dr. Thompson would be any more governmental in nature than disciplinary action taken by the Tallahassee OB-GYNs. The appellees have cited no statutes that authorize Dr. Thompson to take or threaten to take action respecting the status of residents simply because those residents have conducted themselves in a manner inconsistent with private standards of professional conduct that have never been adopted by an agency charged by law with promulgating such standards. Moreover, the plaintiff Center may be complaining, that the Tallahassee OB-GYNs were seeking wholly unofficial action from Dr. Thompson. By the appellees' own admission, the letter was sent to Dr. Thompson simply as a means of communicating to the residents themselves, to whom the OB-GYNs had originally resolved to write, that the aftercare arrangements at the plaintiff's clinic were questionable.

15 We limit our examination to the materials on file at the time the trial court entered summary judgment and ignore twelve affidavits filed by the Center after the court's entry of its order.

judgment recognized that, absent the *Noerr* issue, "the evidence might allow sufficient inferences to submit the case to a jury for decision." The appellants' primary argument in support of summary judgment is that the inferences raised by the Center's pleadings and evidentiary materials cannot stand in the face of contrary evidence that the doctors were motivated solely by concern for the welfare of the clinic's abortion patients. They rely on our decisions in *Soloman v. Houston Corrugated Box Co., Inc.*, 5 Cir. 1976, 526 F.2d 389, *Scranton Construction Co. v. Litton Industries*, 5 Cir. 1974, 494 F.2d 778, and *Scott Medical Supply Co. v. Bedole Surgical Supply*, 5 Cir. 1974, 488 F.2d 934. The appellants misapprehend the teaching of those decisions. Those cases involved claims that the decisions of certain firms not to do business with the plaintiffs were the products of conspiracies or concerted refusals to deal. In each case the defendants prevailed because the plaintiff, in the face of strong evidence that the decisions not to deal were motivated by sound business reasons, failed to adduce concrete evidence that the decisions were other than unilateral. This case differs significantly, for here there is no lack of evidence that the defendants acted jointly.

The appellees also contend that summary judgment is proper because the case is governed by the rule of reason and their conduct was reasonable as a matter of law. They cite our decision in *Hatley v. American Quarter Horse Ass'n*, 5 Cir. 1977, 552 F.2d 646, in which we held the self-regulatory actions taken by industries that necessarily require a high degree of interdependence

and cooperation should not be governed by rules of *per se* Sherman Act illegality absent "at least minimal indicia of anti competitive purpose or effect". *Id.* at 653. Critical to their attempt to bring this case within *Hatley's* warning against indiscriminate application of per se rules is the appellees' assumption that the Center's antitrust action against them is grounded *solely* on the defendants' attempts to impose certain standards of ethical and professional responsibility upon the plaintiff's operations. The *Hatley* case and the Supreme Court's decision in *Silver v. New York Stock Exchange*, 1963, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389, on which *Hatley* heavily relied, concerned attempts of antitrust plaintiffs to characterize the implementation of industry association standards as *per se* illegal boycotts. In *Silver* the plaintiffs' direct wire connections to the NYSE were terminated because of the plaintiffs' violations of the Exchange's regulations. In *Hatley* the plaintiff was denied registration of his colt as a quarter horse because the colt did not meet the association's breeding standards. In both cases the association action was tested by the rule of reason. The complaint in this case does allege that the defendants violated the Sherman Act by their acts in enforcing the standards of the profession. But it goes further. The complaint alleges intimidation and coercion of physicians. The Center contends that the defendants not only sought to enforce a certain standard for aftercare, but conspired to assure that the clinic would be unable to meet that standard. Thus, we cannot say that the entirety of this case should be governed by the rule of reason. To the

extent, moreover, that the Center relies on the theory that the imposition of the no-advertising and aftercare standards is itself an antitrust violation, we cannot say, at least on the present record, that the plaintiff has no hope of showing the "minimal indicia" of anticompetitive purpose that *Hatley* suggested might make *per se* treatment proper. Furthermore, a challenge to the defendants' efforts to enforce professional standards, even if governed by the rule of reason, could not be disposed of summarily, for triable fact issues remain as to the genuineness of the defendants' justification, the reasonableness of the standards themselves, and of the manner of their enforcement.

Appellees argue, finally, that at least partial summary judgment is proper because the plaintiffs have no evidence of damage, and because the Center cannot make the showing, requisite to recovery for attempts to monopolize, that the defendants were or are dangerously close to monopoly power. The doctors argue that the Center cannot hope to prove damages because the clinic's business has actually flourished since the commencement of the alleged conspiracy. We do not agree that summary judgment on the issue of damages would be warranted on the existing record. Although the income of the clinic may have increased during and after the conspiracy, as the doctors contend, that fact would no more preclude proof of damage than a decrease in income, without more, would establish the fact of damage. We have no assurance that the growth of the clinic's business was not retarded by the alleged actions of the defendants. Nor do we agree that summary judgment as to the plaintiff's section 2 claim is in order. The allegations and evidence raise a genuine fact issue concerning the doctors' proximity to monopoly power. The OB-GYNs at Tallahassee Memorial were, prior to the opening of the clinic, the major, if not only, providers of abortion services in the Tallahassee area. The success of their alleged attempt to prevent other physicians from working at the clinic would have eliminated their only competition. We cannot say, at the present stage of this case, that the defendants were not dangerously close to possessing monopoly power.

Summary judgment of the Center's federal antitrust counts against the OB-GYNs must be vacated.[16]

IV

DEFENDANT PALMER

In its pretrial order of September 3, 1976, the trial court granted defendant Palmer's motion for summary judgment. The court's reasons were not set forth in the order, but an earlier memorandum of decision suggests that the court believed Dr. Palmer to be protected by the "state action" defense of *Parker v. Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. The Center appeals that ruling, urging that there are triable issues

16 On appeal, the Center has urged for the first time the claim that the defendants' conduct amounted to an attempt to regulate the accessibility of abortion services in violation of patients' privacy rights under the *Roe v. Wade* line of decisions. This claim was never raised before the trial court, and we see no need to address it at this time.

of fact as to Palmer's role in the alleged conspiracy and as to whether his actions were "state action" within the meaning of the *Parker* doctrine.

A. *The Coercion and Conspiracy Issues.*

Dr. Palmer urges that, even apart from a possible *Parker* defense, the trial court's entry of summary judgment was correct because the Center has come forward with no evidence of conspiracy and because the evidentiary matter on file establishes that Palmer's conduct was not coercive.

Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted when affidavits, depositions, and other materials on file show "that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law". The Center's evidence of coercion consists of Dr. Palmer's telephone conversation with Dr. Whaley, Whaley's subsequent departure from the clinic, and the follow-up trip made by one of Palmer's investigators to the clinic. The objective facts, including the substance of Palmer's advice to Dr. Whaley, are largely undisputed. The crucial factual dispute concerns the characterization of Palmer's conduct. This involves elusive questions of intent and motive, the type of questions that, the Supreme Court has warned, should seldom be disposed of by summary procedures. *Poller v. Columbia Broadcasting System, Inc.*, 1962, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458. The Center's allegations and

evidentiary matter do raise triable issues concerning Palmer's intentions and the character of his words to Dr. Whaley, and the evidence adduced by Dr. Palmer does not decisively controvert the Center's version of the facts.

It suffices here to state Dr. Whaley's version of the telephone call. In his deposition Whaley recalled that Palmer advised him that it would benefit him to leave the clinic, inasmuch as the clinic was controversial and had questionable aftercare arrangements. Whaley ultimately left the clinic, he said, not "specifically" on Dr. Palmer's advice, but "because of the advice of several people and what I felt myself to be beneficial to me". Dr. Palmer points to this as establishing the absence of coercion. On the contrary, Whaley's account of the telephone conversation could be reasonably construed as suggesting that Palmer's call contributed to Whaley's decision to leave the clinic. The causation issue is surely not disposed of by Whaley's characterization of Palmer's advice as "helpful" and uncoercive. Nor does Dr. Whaley's account resolve issues concerning Dr. Palmer's state of mind. There are triable issues whether Dr. Palmer intended his communication as a subtle threat to Whaley's career or should reasonably have known that it would be construed as such, or whether Palmer simply intended, in all innocence, to give avuncular advice to the young physician. As in many antitrust cases, the conduct alleged takes its character from its context. Actions innocent and lawful in themselves become actionable

when undertaken pursuant to an unlawful conspiracy. *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914).

Palmer strenuously urges that the Center has no shred of evidence that he conspired with the other defendants. He argues that the Center has failed to set forth any theory of why he would have conspired. The only communications between himself and the other defendants, so far as the evidence shows, were the letter of complaint sent him by the OB-GYN Committee and his subsequent call to Dr. Mohammad reporting the results of his investigation. These communications, he says, evidence no agreement whatsoever. Thus, Dr. Palmer concludes, the plaintiff's allegations of conspiracy are unsupported by affidavits or depositions, and cannot stand in the face of Dr. Palmer's deposition answers to the contrary under our decision in *Saenz v. University Interscholastic League*, 5 Cir. 1973, 487 F.2d 1026.

This is not, however, a case of a plaintiff relying strictly on the strength of bare allegations, as in *Saenz*. The Center has set forth evidentiary matter and contends that the depositions and interrogatories permit the inference that Dr. Palmer conspired with the defendant physicians. It is common learning that summary judgment may be improper if the parties disagree about the inferences that may reasonably be drawn as to any material issue of fact. *Insurance Co. of North America v. Bosworth Construction Co.*, 5 Cir. 1972, 469 F.2d 1266, 1268; *Lighting Fixture & Electric Supply Co. v. Continental Ins.*

Co., 5 Cir. 1969, 420 F.2d 1211, 1213. The question presented, then, is whether the evidentiary matter adduced below supports a reasonable inference of conspiracy between Dr. Palmer and the other defendants. In addressing that question we must view the facts set forth in the materials in the light most favorable to the Center, the party opposing the summary judgment motion. *Adickes v. S. H. Kress & Co.*, 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142; *Time, Inc. v. Ragano*, 5 Cir. 1970, 427 F.2d 219, 221. Applying these principles, we find that there remains a triable issue as to Dr. Palmer's participation in the alleged conspiracy.

The evidentiary matter before the district court showed only one communication between the OB-GYNs and Dr. Palmer that occurred prior to Dr. Palmer's conversation with Dr. Whaley — the doctors' letter of complaint. The character of Dr. Palmer's actions after receiving the Committee's request, viewed against the background of the controversy brewing in the Tallahassee medical community, can reasonably give rise to an inference that Dr. Palmer embraced the alleged plans of the other defendants.[17]

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17 We are aware that, as Dr. Palmer urges, an agreement to violate the law is the essence of conspiracy. *Joseph E. Seagrams and Sons, Inc. v. Hawaiian Oke Liquors*, 9 Cir. 1969, 416 F.2d 71, *cert. denied*, 1970, 396 U.S. 1962, 90 S.Ct. 752, 24 L.Ed.2d 755. We hold only that there is a triable issue as to whether Dr. Palmer and the other defendants arrived at some form of agreement. Palmer urges that he had no opportunity to conspire inasmuch as he never discussed the clinic with the other defendants before they sent the letter of complaint. Although it is true that the Center has cited no direct evidence of such a communication, and Dr. Palmer has denied that he spoke with the others before he called Dr. Whaley, we think the

Against the Center's largely circumstantial evidence of a conspiracy between Dr. Palmer and the other defendants stands Palmer's testimony that his advice to Dr. Whaley was inspired solely by his concern for the young physician's professional welfare. Our decisions have established that evidence of conspiracy consisting wholly of a series of inferences cannot stand against overwhelming evidence that the challenged action was taken unilaterally for sound business reasons. *See, e.g., Soloman v. Houston Corrugated Box Co., Inc.*, 5 Cir. 1976, 526 F.2d 389; *Scott Medical Supply Co. v. Bedsole Surgical Supply*, 5 Cir. 1974, 488 F.2d 934. We cannot say, however, that Dr. Palmer's evidence as to motive is so convincing that an inference of conspiracy could not reasonably be drawn. It is, concededly, not clear what personal stake Dr. Palmer might have had in a scheme such as the Center alleges here. But we reject Palmer's contention that an easily discernible motive is an essential element in a §1 conspiracy claim. The apparent absence of motive may be probative of a defendant's innocence, but it does not, of itself, preclude taking a case to the jury.

Center is entitled to try the issue to a jury. We note that prior to Dr. Palmer's visit to the clinic and his call to Dr. Whaley the OB-GYN Staff had on two or three occasions written to the Capitol Medical Society — of which Dr. Palmer is a member — complaining about the clinic and asking the CMS to take action regarding the clinic. Moreover, it is clear that Dr. Palmer did have an opportunity to discuss the clinic with the defendants prior to the follow-up visit by Dr. Palmer's investigator, Mr. McCollum. The Center complains that this follow-up visit could have had nothing to do with official BOME business because Palmer had "closed" the Whaley investigation and the BOME has no jurisdiction over medical institutions, as opposed to practitioners.

B. *The* Parker *Defense.*

The "state action" exemption from antitrust liability is generally said to have originated in *Parker v. Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, in which the Supreme Court held that an anticompetitive agricultural program established by California law was immune from Sherman Act attack. The Court found no basis in the language or history of the Sherman Act suggesting that the Act was designed "to restrain a state or its officers or agents from activities directed by its legislature". *Id.* at 350-51, 63 S.Ct. at 313. Antitrust liability cannot, therefore, be premised on anticompetitive market effects that are imposed by an act of government.

We have held that the acts of a subordinate state governmental entity are immune from antitrust challenge to the extent that they are "comprehended within the powers granted to it by the Legislature". *City of Lafayette v. Louisiana Power & Light Co.*, 5 Cir. 1976, 532 F.2d 431, 434, *aff'd*, 1978, 434 U.S. 811, 98 S.Ct. 1123, 55 L.Ed.2d 364. A plurality of the Supreme Court expressly approved the state action test that we st forth in *City of Lafayette. City of Lafayette v. Louisiana Power & Light Co.*, 1978, 98 S.Ct. 1123, 1137-38; *see also Bates v. State Bar of Arizona*, 1977, 97 S.Ct. 2691, 433 U.S. 350, 53 L.Ed.2d 810. Dr. Palmer therefore enjoys immunity to the extent that his conduct was within the scope of the authority granted to the director of the BOME by the Florida legislature. The scope of the agent's authority "may be demonstrated by explicit language in state

statutes, or may be inferred from the nature of the powers and duties given to a particular government entity". *Duke & Co. v. Foerster*, 3 Cir. 1975, 521 F.2d 1277, 1280.

Dr. Palmer is Executive Director of the Florida Board of Medical Examiners. The Board's powers derive from Florida's Medical Practice Act. The general purpose of the Act is to protect the public against improper or unqualified practice of medicine and from professionally irresponsible conduct by persons licensed to practice medicine. Section 458.11 of the Florida Statutes authorizes the Board to aid law enforcement officials in the enforcement of the Act and the prosecution of persons charged with violating it. The Board is empowered in its discretion to issue administrative warning letters to licensed physicians for "apparent violations" of the Act, and to require the registration of unlicensed physicians practicing medicine where such practice is authorized. Section 458.1201(1) empowers the Board to discipline physicians for engaging in unethical, immoral, or unprofessional conduct or practice, for maintaining professional association with a person who is in violation of the Act or of the Board's regulations, for assisting the unlawful practice of medicine, or for being removed, suspended, or disciplined by his peers within a professional medical association or review organization. The nature of the disciplinary action authorized is set forth in section 458.1201(3)(a). The Board may deny a physician's license application, revoke, withhold, suspend, or

restrict his license, or it may require him to submit to a variety of remedial or educational programs, and it may "[a]dminister a public or private reprimand."

We find nothing in the Medical Practice Act justifying summary judgment in Dr. Palmer's favor on the state action issue. The essence of the complaint against Palmer seems to be that, pursuant to a conspiracy, he used the prestige of his position to coerce Dr. Whaley into leaving the clinic. Aside from section 458.11(8)'s provision for administrative warning letters, the statute does not authorize the Board or its Director to use any sort of pressure or powers of persuasion to the end of causing a physician to cease and desist from engaging in practices that have never been adjudicated to be illegal or improper. Dr. Palmer's contention that the call was a private reprimand authorized by section 458.1201(3)(a) 3 is without merit. That provision authorizes the Board to enter "an order" of reprimand whenever it "finds any person unqualified or guilty" of any violation of subsection (1). Dr. Palmer acted entirely on his own in this matter; there was no formal finding of guilt and no "order" was entered by the Board. Nor was Dr. Palmer's action the exercise of whatever residual disciplinary power, if any, may be granted by section 458.1201. That section gives *the Board* authority to discipline a physician who, "after hearing, has been adjudged unqualified or guilty" of the practices set forth therein. Finally, Palmer's telephone call to Dr. Whaley cannot be construed as a form of "administrative warning letter", which under section

458.11(8) the Director may issue, in his discretion, for "apparent violations" of the Act. On this point, Dr. Palmer stands impeached by his own characterization of the Whaley call. In his deposition, Palmer stated that he told Dr. Whaley that "[t]his is a personal call to you concerning your activities in Tallahassee". Although Palmer's characterization of the call does not estop him from now arguing that the call was official business, it is certainly strong evidence that it was not. Moreover, Dr. Palmer informed both Dr. Whaley and Dr. Mohammad that he'd found no violations of the Act, either apparent or otherwise. This seems to us to defeat any contention that the call was an "administrative warning".[18]

Our ruling does not imply, however, that Dr. Palmer cannot in any eventuality avail himself of the state action defense. Our disposition of this appeal is dictated by the posture of the action. The theory of the plaintiff's case against Dr. Palmer is not yet entirely clear,

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18 We agree with Judge Thornberry's observation in his concurring opinion that Dr. Palmer is not foreclosed from demonstrating that his call to Dr. Whaley is comprehended by the authority granted him by the legislature. We hold only that the summary judgment granted in his favor cannot be sustained on the theory that the telephone call was an "administrative warning letter" within the meaning of section 458.11(8). We do not mean to imply that Dr. Palmer cannot ultimately show "from the nature of the powers and duties" granted him, *see Duke & Co. v. Foerster*, 3 Cir. 1975, 521 F.2d 1277, 1280, that his call was a form of activity that may fairly be characterized as official action because integral to the process by which the Board or its Director discharges responsibilities expressly given them by the legislature. The telephone call could come within the *Parker* exemption in the absence of express statutory authorization for it.

and our duty is simply to determine whether there is any conceivable theory of the case under which Palmer would not be entitled to *Parker* immunity. We hold that there is. We conclude that summary judgment was improperly granted in favor of defendant Palmer on the Sherman Act issues.

V

THE STATE LAW CLAIMS

The Center's complaint in this action contained two state law counts that were also summarily adjudicated in favor of the defendants.

A. *Interference with Contractual Relations.*

The Center complained that the defendant's actions amounted to tortious interference with the clinic's business relations with its physicians. Under Florida law the plaintiff is entitled to recovery upon showing (1) the existence of a businesss relationship (not necessarily one evidenced by an enforceable contract) under which the plaintiff has some legal rights; (2) the alleged tortfeasor's knowledge of the relationship; (3) the defendant's intentional interference with that relationship in a manner that is not legally justified or excused; and (4) damage to the plaintiff. *John B. Reid and Assocs., Inc. v. Jiminez*, Fla.App. 1965, 181 So.2d 575; *Smith v. Ocean State Bank*, Fla.App. 1976, 335 So.2d 641.

The district court granted summary judgment for the defendants on this issue. The court was of the opinion that, absent evidence that their conduct was "sham", the physicians' interference, if any, with the clinic's business relations would be justified by their statutory authority to report and investigate questions of medical ethics and professional responsibility. Judgment was granted because the court found the plaintiff's evidence of sham conduct to be insufficient.

The entry of summary judgment was erroneous. The district court's incorrect view that the core of the complaint goes to protected petitioning activity determined its approach to the plaintiff's tort count. We agree with the district court that petitioning activity is protected from state law liability as well as from federal antitrust liability. But, as we noted in Part III, much of the OB-GYNs' activity that the Center complains of is not protected petitioning activity. The doctors' complaint letter to the BOME cannot be made the basis of tort liability, but the other activity alleged is fair game. Whether the nonpetitioning activity amounts to tortious interference with business relations must be determined at trial. Assuming, without deciding, that the defendants' alleged concern for the public welfare would constitute adequate justification or excuse under Florida law, triable issues nonetheless remain as to the genuineness of the defendants' concern, and also as to the scope of the justification. If, as the Center alleges, the doctors' activities went beyond mere persuasion and included threats, we do not think that the

purity of their motivations would shield them from liability.[19]

Dr. Palmer contends that his actions are protected by Florida's doctrine of official immunity. As stated in *Schrank v. Bless*, 1976, M.D.Fla., 412 F.Supp. 28, 40, "[P]ublic executive officials, acting within their official capacity, are protected by a qualified immunity from liability, in the absence of demonstrated bad faith". Dr. Palmer is not entitled to summary judgment on the basis of this defense. Disputed fact issues remain as to whether Dr. Palmer's actions were within the scope of his official capacities, and, if so, whether he acted in good faith.

B. *The Florida Antitrust Statute.*

The Center's complaint contained counts under the Florida antitrust statute, §542.05 of the Florida statutes. That section, in broad outline, prohibits combinations formed for the purpose of restricting trade, fixing prices, or preventing competition in the provision of merchandise, produce, or commodities. The district court ruled that the Center's claim is barred by the holding of *Moles v. White*, Fla.App. 1976, 336 So.2d 427, *cert. dismissed*, Fla. 1978, 355 So.2d 516, that the statute does not reach the practice of medicine or the operation of hospitals. We affirm.

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19 The issue of justification or excuse is a complex one that must be decided by weighing numerous factors. *See* Restatement of the Law of Torts, §767 (1939).

The *Moles* decision is the sole authority on the applicability of §542.05 to the medical profession. The Florida Supreme Court has determined, in *Akey v. Murphy*, Fla. 1970, 238 So.2d 94, that another part of chapter 542, specifically section 542.12, governs the conduct of physicians. But that court has yet to address the question decided in *Moles*. *Erie* does not, of course, require us to follow blindly the appeals court's decision in *Moles*. We may depart from the authority of an intermediate state appellate court decision if there is "persuasive data that the highest court of the state would decide otherwise". *West v. American Telephone & Telegraph Co.*, 1940, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139; *Shelp v. National Surety Corp.*, 5 Cir. 1964, 333 F.2d 431. We turn to the data.

The statute prohibits anticompetitive conduct on the part of "any person", and might therefore seem to be of general application. The statute reaches "restrictions in trade or commerce", and bans all manner of fixing prices for merchandise, produce, or "commodities", which the statute defines in §542.01(2) to include "service or output of a service trade". The statute contains an express exemption for nonprofit agricultural cooperatives,[20] but none for hospitals or the medical profession.

Facial scrutiny, however, does not dispose of the question. Terms such as "commerce", "commodity", and "service" are so general that they tell us little about

20 Fla.Stats. §542.05(5).

hard questions of exclusion or inclusion. Some effort must therefore be made to guess the intentions of the legislature that enacted the statute. Consideration of the statute's history suggests that it was not intended to reach the medical profession. Section 542.05 has its provenance in §5, chapter 6933 of the Laws of Florida, Acts of 1915. The statute survives in nearly its original form, the only major change being the addition, in 1941, of the proviso excepting agricultural and horticultural cooperatives from the statute's prohibitions. The statute thus antedates by at least half a century the modern view that the learned professions are "business" or "commerce" just like any other for-profit endeavor. In light of the former popularity of the view that the learned professions were not "trade", and therefore not subject to the federal antitrust laws, *see Atlantic Cleaners and Dyers, Inc. v. United States*, 1932, 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204, a view that persisted in some courts until the Supreme Court's *Goldfarb* decision,[21] it seems unlikely that the 1915 Florida legislature thought that its anticombination statute comprehended the medical profession.

The Florida Supreme Court's ruling in *Akey v. Murphy*, Fla. 1970, 238 So.2d 94, does not support the appellant's case. The question in *Akey* was whether subsections (2) and (3) of §542.12 apply to physicians.

21 *See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 1970, 139 U.S.App. D.C. 217, 432 F.2d 650; *Greene v. Howard Univ.*, 1969, 134 U.S.App.D.C. 81, 412 F.2d 1128; *Riggall v. Washington County Medical Society*, 8 Cir. 1957, 249 F.2d 266.

Those provisions remove certain kinds of noncompetition covenants from the scope of the general prohibition of such covenants contained in subsection (1) of §542.12. The court in *Akey* reasoned that, because subsection (1) expressly applies to "professions", then subsections (2) and (3), which essentially modify subsection (1), also reach "professions" — including the medical profession. *Akey* does not hold or even imply that chapter 542 as a whole applies to the practice of medicine. The provision construed in that case was first enacted in 1953 and was, apparently, modeled upon similar statutes in other states. *Akey v. Murphy*, 238 So.2d at 96. Section 542.05 was enacted in 1915. It contains no reference to professions. That the Florida Supreme Court sees no conflict between the *Akey* and *Moles* decisions is suggested by its dismissal of the certiorari petition filed in *Moles* itself. Under Florida law a decision of an appellate court comes within the Supreme Court's constitutional certiorari jurisdiction if it conflicts with a decision of the Supreme Court or of an appeals court on the same point of law.[22] If *Akey* and *Moles* were irreconcilable the Florida Supreme Court would probably not have dismissed the certiorari petition as it did.

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22 Article V, §3(b) of the Florida Constitution states:

JURISDICTION.—The supreme court:

* * *

(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

Because we are not convinced that the Florida Supreme Court would hold §542.05 applicable to the medical profession, we are bound by the authority of the state appellate court's *Moles* decision. We therefore affirm the district court's ruling dismissing the state antitrust law claim.

VI
CONCLUSION

Triable issues of fact underlying the Center's Sherman Act and common law tort claims against all the defendants remain. The judgments in favor of the defendants are REVERSED, and the cause is remanded for trial.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

THORNBERRY, Circuit Judge, specially concurring:

As is his custom, Judge Wisdom has written an able opinion for the court. I fully concur in the result and without wishing to detract from his opinion, I wish to add a few thoughts of my own.

Dr. Palmer insists that his call to Dr. Whaley was a form of "administrative warning" contemplated by the Florida statutory scheme. The majority holds that at this juncture, summary judgment is improper on the

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) issue. With this determination, I agree. I wish, however, to write briefly to emphasize that our court has not held that Palmer has no *Parker v. Brown* exemption.

The majority notes that summary judgment is improper on the *Parker* issue because: (1) Dr. Palmer announced to Dr. Whaley that his call was "personal" in nature, and (2) Dr. Palmer informed both Dr. Whaley and Dr. Mohammad that he had found no violation at the Center. I have no doubt that in the face of these facts, there remains a triable issue as to Dr. Palmer's motive in making the call. I eschew, however, the majority's characterization that this evidence is "strong" that Dr. Palmer was not acting within the scope of his authority when he made the calls. I would not be surprised to find that as a first step, such informal communications almost always precede a formal communication and official adjudication. In *City of Lafayette v. La. Power & Light Co.*, 434 U.S. 811, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978), the Supreme Court said that the *Parker* exemption does not depend on the ability "to point to a specific, detailed legislative authorization." Similarly, I do not think it is a requirement of *Parker v. Brown* that the official claiming the exemption must wear the robe and carry the mace before the exemption applies.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

OFFICE OF THE CLERK

MARCH 5, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-1924 — FEMINIST WOMEN'S HEALTH CENTER, INC., etc v. MAHMOOD MOHAMMAD, Et. Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ Sally Hayward
Deputy Clerk

cc: Ms. Betty Owen Stinson
Mr. Steven Seliger
Mr. Kent Spriggs
Ms. Nadine Taub
Mr. B. J. Bradshaw
Mr. M. Stephen Turner
Mr. John C. Cooper
Mr. J. Lewis Hall, Jr.
Mr. Frank J. Santry
Mr. Michael Schwartz

GEORGE PALMER

PROCEEDINGS

REPORTERS NOTE:

The following is an excerpt of the deposition of George Palmer, M.D., taken on June 30, 1976. Said excerpt was ordered by the Court to be sealed by the Court Reporter.

DIRECT EXAMINATION (continued)

BY MS. STINSON:

Q Doctor, I believe that the letter of August 29, 1975, that you are referring to is from Mahmood Mohammad as chairman of the OB-GYN Department of the Tallahassee Memorial Hospital on behalf of the OB-GYN Department; is that correct?

A Yes.

Q And a portion of that letter makes reference to advertising: "This group has advertised their services in an unethical way seeking and soliciting patients."

Do you know what reference "this group" was to?

A I would assume he is referring to the group mentioned in the second paragraph, the Women's Feminist Health Clinic.

* * * *

[8] Q Were you investigating the clinic?

A Well, physically I entered the clinic and looked at it, yes.

Q And why did you enter the clinic and look at it?

A Because I couldn't investigate the clinic without being there physically.

Q What were you looking for, Dr. Palmer?

A I was looking for any person in authority who could tell me how the clinic operated.

Q And what were you trying to determine about the clinic's operation?

A I was trying to determine what the clinic did and who did it as far as the practice of medicine is concerned, medicine and surgery is concerned.

Q Did you determine what the clinic did?

A Yes.

Q What is that?

A They performed, among other things, abortions. And they also, I think, instructed women in self-examination and self-health, as by the name on the sign of the clinic.

[9] Q What did you determine about the practice of medicine at that clinic?

A I specifically asked who performed the abortions and the physical examinations of the patients who had abortions.

Q What did you determine?

A I determined that MD's did this.

Q Did you get the names of the MD's?

A Yes.

Q What were their names, if you recall?

A I recall only one name which was given to me at the time, and it was Dr. Whaley from Jacksonville.

Q When was it that you went to the clinic?

A I went down on September 5th, 1975.

Q Were you alone?

A No. The investigative advisor of the Board of Medical Examiners was with me.

Q And it's your testimony that you were there as a result of this letter of August 29th from Mahmood Mohammad.

A Yes.

* * * *

[13] A I can't recall specifically words used except that I introduced myself and Mr. McCollum. And I told them we were there in response to a complaint, and that we wanted to look over the place. And we asked them some questions.

Q What kind of questions did you ask, Dr. Palmer?

A I asked who performed the abortions?

Q What else did you ask.

A I asked specifically, I do recall, about whether there were provisions for twenty-four hour coverage following the performance of their abortions, twenty-four hour coverage of the patients on whom abortions were performed.

Q Did you get a response to that question?

A I don't recall a specific response, but I believe the answer was generally they had arrangements with a local hospital for follow-up.

* * * *

[16] Q I believe there is a memorandum in your file that you made to the file on September 12.

A Yes.

Q 1975. That memorandum indicates that you talked to Dr. Mohammad down near the bottom, I believe, Dr. Palmer.

A (Examining instrument) Oh, yes. I did tell him what I found. That was in essence what is in this memorandum.

Q Did you at that time inform Dr. Mohammad that Walker Whaley was the physician who was performing the medical practices at the clinic?

A I don't know whether I specifically told him that, but I told him that I had spoken to Dr. Whaley.

Q You mentioned Dr. Whaley's name in the course of that conversation?

A Yes.

Q Did you have this communication with Dr. Mohammad on the same day as your visit?

A I don't recall that.

Q You indicated that you had spoken to Dr. Whaley. When did you speak to Dr. Whaley?

A The same day.

Q How soon after your visit to the [17] health center did you speak with Dr. Whaley?

A Within two or three hours, I would say.

Q Why did you call Dr. Whaley?

A I called Dr. Whaley in order to tell him what I felt about his conducting surgical procedures in a city 170 miles removed from where he formally resides without adequate pre-arranged twenty-four hour coverage of the patients on whom he performed the abortions.

Q Is this just your personal feeling?

A I prefaced my statement by saying that it was my feeling from my education and background and experience as a physician over a period of 35 years.

Q But you can point out no standards that require that?

A We don't need any standards in that case. I think that's an understood part in the practice of medicine that you are responsible for your patients, whether medically or surgically, twenty-four hours a day. You can't pass the buck unless you provide officially for coverage with another physician who will take care of patients during those periods.

* * * *

[21] Q Had you made an investigation or any inquiries as to whether or not post-operative care was be-

ing performed in Tallahassee to patients who had been seen by Dr. Whaley?

A Yes.

Q And what inquiries or investigations did you make?

A I made inquiry with the hospital, directly with Mr. Mustian on the same day that I visited the Feminist Women's Health Center.

Q Was it before or after your conversation?

A After.

Q Before or after your conversation with Dr. Whaley?

A Before.

Q What did Mr. Mustian tell you?

A Mr. Mustian said there was definitely no formal arrangement between the Tallahassee Memorial Hospital and the Feminist Women's Health Center concerning twenty-four hour coverage of their patients following procedures done at the Feminist Women's Health Center; and that any citizen in this area could, of course, visit or go to the emergency room at the Tallahassee Memorial Hospital, ...

* * * *

[25] Q Was that the end of your concern and any action you took concerning the back-up issue?

A I considered my conversation with Mr. Mustian as adequate because there's only one hospital facility in Tallahassee which could receive any patients if it were necessary to receive them as a result of procedures performed at the Feminist Women's Health Center.

Q Since you indicated in that memorandum that it was legal for Walker Whaley to do what he was doing, did that mean that it was okay for him to continue to do what he had been doing as far as you were concerned or the Board of Medical Examiners?

A If he had — well, legally, yes. He could continue performing abortions at the Feminist Women's Health Center if he so desired, yes.

Q Be in compliance with the Medical Practice Act?

A Yes.

Q Did that memo to the file conclude your investigation?

A In essence, it did, yes. That's the one and only time that I have been there.

[26] Q Did it resolve the issue of the complaint sent to you by Dr. Mohammad as to whether or not there was a violation of the Medical Practice Act occurring at the center?

A Yes.

Q Dr. Palmer, why was Thomas Hannah sent to the Feminist Women's Health Center on September 30 '75?

A Because at the time I went on September the 5th along with Mr. Collum, Tom Hannah was not in the office. He was out on another assignment. And I just wanted Tom Hannah, in case any further follow-up was necessary, to have knowledge of the Feminist Women's Health Center.

I just told him to go over there, tell them who he was, and so if there were any further necessity for any visits, well, he could carry on.

Q Was he instructed to obtain any information from the health center?

A Not that I recall, just to see if they had anyone at the present time who could legally perform the abortions. I don't recall exactly what I told him other than generally just go by there.

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF LEON

I, GEORGE S. PALMER, M.D., Executive Director of the Florida State Board of Medical Examiners, do hereby file this Affidavit that in the middle of January, 1970, I completely retired from the active practice of medicine in Tallahassee, Florida, in order to assume my full-time duties and responsibilities as Executive Director of the Florida State Board of Medical Examiners.

/s/ GEORGE S. PALMER, M.D.
GEORGE S. PALMER, M.D.

SWORN TO AND SUBSCRIBED TO
before me this 11th day of
April, 1979.

/s/ ANN M. MAYNE
Notary Public, State of Florida at Large
My Commission Expires April 4, 1980
Bonded by American Fire & Casualty Co.

[SEAL]

WALKER WHALEY

[15] Q Did you act on Dr. Palmer's advice?

A Not specifically, no, I didn't. I ultimately left, if that's what you're leading up to because of the advice of several people and what I felt myself to be beneficial to me.

* * * *

[16] Q After you got that call from Dr. Palmer, did you return to the Health Center to work?

A I believe that I returned one time.

* * * *

[17] Q What was the subject matter of those conversations?

A Mostly would I return to work.

Q Did you say you would or you would not?

A I said that I would not under the present circumstances.

Q Did you state any circumstances under which you would return?

A I believe I said if they had hospital backup that we would consider returning.

Q Did anyone at the Health Center tell you there was such backup?

A I was always told that there was backup.

Q Did they tell you who that backup was?

A Seems to me like they mentioned two names, but I can't recall the names.

Q Did you ever have any conversations with any Tallahassee OB-GYNs subsequent to the time that you terminated your employment with the Health Center?

A No, I didn't, personally.

Q Did you ever have a conversation with Dr. Cooper?

A No. Dr. Wolf, I believe had a conversation with Dr. Cooper.

MAX SUTER

[34] Q You said "Watch out"?

A I don't know if those are my specific words.

Q Have you told us that if aftercare was not being provided, what would your advice to them have been?

A I'd say, "Don't touch it with a ten-foot pole."

ROBERT THOMPSON

[18] Q After having received this letter and the enclosure, did you receive any telephone calls from anyone in regard to this letter and the enclosure?

A Not of the physicians here, no.

Q Do you recall receiving a telephone call from Dr. Mohammad inquiring as to whether or not you had received a letter he sent?

A I don't recall that.

Q You do not recall that?

A No.

Q What if any action did you take after receiving the letter and the enclosure?

A My action in this regard was not as chairman of the department but a recommendation to the residents that if the local community was so down on the clinic that their complaint about 24-hour coverage, if legitimate, my recommendation to them would be to not work there until this was resolved locally.

Q In other words, is it safe to say then your medical concerns were as to the existence of 24-hour back-up coverage?

A Yes, and also the concern for them not getting into trouble.

* * * *

[22] Q Is it safe to say it is not tolerated on other than medical grounds?

MR. FIELD:

Objection. Without his knowledge, he doesn't have the ability to answer that question.

MR. PARSONS:

Would you answer the question?

A I don't know that.

Q What kind of inference comes from the letter in regard to the local situation in Tallahassee?

MR. WADSWORTH:

Objection. The letter speaks for itself.

A Again, the main concern is the 24-hour coverage.

Q Dr. Thompson, has Dr. Mohammad, other than the letter, has he ever contacted you in any other fashion regarding the Feminist Women's Health Center in Tallahassee and your residents working there?

A No.

Q Have you ever had any contact from Dr. George Palmer, head director of the Florida Medical Examining Board in regard to the Women's Feminist Health Center?

A No.

Q Have you ever had any contact from any Tallahassee physicians regarding the Feminist Women's Health Center?

A Only Dr. Knight, who is a personal friend.

* * * *

[24] Q Do you recall a conversation when Dr. Whaley was in your office when Dr. Mohammad called after you had received the letter?

A Not to my recollection, but you must

remember Dr. Mohammad is one of my ex-residents and we do share referral of patients. So Dr. Mohammad has called. His call is not uncommon. In fact, he might even call me at home. I'm just sorry, but I don't recollect regarding the letter.

Q Dr. Thompson, is it customary in the medical field for back-up arrangements to actually be reduced to writing between physicians?

A No.

Q Are these generally informal arrangements to cover each other?

A Yes.

Q Does the fact that you suggested that the arrangement in Tallahassee be reduced to writing as a —

MR. FIELD:

I object to the question. I am not sure Dr. Thompson so said. He suggested, I think he said it came up in conversation with his residents. The record is clear as to who originated that thought.

Q Who originated the thought, Dr. Thompson, that the back-up arrangements in Tallahassee be reduced to writing?

A I don't recall, but it may very well have been me.

[1]458.121 PROCEDURE FOR REVOCATION, SUSPENSION, ETC.—

* * * *

(7) Notwithstanding any provision of this section or any other law to the contrary, when there are charges to be preferred against a licensed physician involving any one of the offenses set forth in s. 458.1201(1)(b), (c), (e), (h), (i), (l) or (n), or when a physician has failed to comply with the probationary order entered pursuant to s. 458.1201(3)(b) and in the opinion of the director and two members of the board the evidence in support of the violation is clear, competent, and unequivocal, the director may enter an order temporarily suspending the physician's license to practice medicine, without hearing, pending a full hearing as provided herein. The suspension order may be entered prior to the filing of a complaint. The full hearing shall be conducted within 60 days from the date of the suspension order. The temporary order of suspension herein provided for shall be without prejudice to the right of the physician at full hearing.

History—s. 2, ch. 26552, 1951; s. 9, ch. 61-243; s. 3, ch. 69-205; s. 3, ch. 76-168; s. 1, ch. 77-457.

[1]*Note*—Repealed by s. 3, ch. 76-168, as amended by s. 1, ch. 77-457, effective July 1, 1979.

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